IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

H. DOUGLAS MILLER and DANENE R. MILLER, individually and as conservator(s) of LAURA K. MILLER, LINDY L. MILLER and CLINT T. MILLER, minors, *et al.*,

Petitioners,

v.

CAMPBELL COUNTY, WYOMING; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CAMPBELL, BILL BARKLEY, THOMAS OSTLUND, and MICKEY WAGENSEN; CAMPBELL COUNTY SHERIFFS' DEPARTMENT, CAMPBELL COUNTY HEALTH DEPARTMENT, CAMPBELL COUNTY ENGINEERS' OFFICE, CAMPBELL COUNTY FIRE BOARD, and CAMPBELL COUNTY EMERGENCY SERVICES AGENCY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a county government permanently deprive 170 families of their real and personal property rights in their homes without violating the United States Constitution?

2. When a county government ordered the evacuation of 170 families from their homes, and those families bring claims for inverse condemnation and denial of due process, are their procedural and substantive due process claims "subsumed" within their takings claims?

3. Can the claims of 170 property owners forcefully evacuated from their homes be dismissed through judgment on the basis that, although an emergency did not exist, the county had to act with sufficient urgency to deny property owners any effective chance to be heard prior to depriving them of their property?

4. Can the courts rule as a matter of summary judgment that property owners forcefully evacuated from their homes were given their rights under the Due Process Clause of the Fourteenth Amendment, when the county commissioners ordered 170 families to evacuate their homes over eight weeks later, yet the commissioners made this decision based on scattered and unconfirmed reports of gases seeping in the area, at a meeting where homeowners' comments were severely limited, in the mistaken belief that such an order would make federal disaster relief available?

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OPINIONS DELIVERED IN THE CASE

The United States District Court for the District of Wyoming entered summary judgment dismissing plaintiffs' claims. [App. at 32a.][1] The United States Court of

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[1] That decision relied on findings of fact rendered in a related case, *Miller v. Campbell County*, No. C88.-0194J (Oct. 2, 1989). That decision is provided in the Appendix. App. at 11a.

Appeals for the Tenth Circuit affirmed the district court's judgment. [App. at 1a.]

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Tenth Circuit rendered its opinion dismissing Plaintiffs' claims on September 24, 1991. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. § 2101(c).

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const., Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amendment XIV:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was brought by members of 82 families who formerly lived in the Rawhide Village Subdivision, located near Gillette, Wyoming.[2] The county government ordered

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[2] Plaintiffs: H. Douglas Miller, Danene R. Miller, Laura K. Miller, Lindy L. Miller, Clint T. Miller, Steve Adams, Peggy Adams, Christie Adams, Jamie Adams, Scott G. Anderson, Tobey J. Anderson, Michael Todd Anderson, Chanel S. Anderson, Tobin P. Anderson, Paul D. Bailey, Jr., Roxanne G. Randall, Robert L. Bailey, Della A. Bailey, Della L. Bailey, Leroy D. Barnett, Betty C. Barnett, Susan Bechtel, Laurie Johnson, Lisa Johnson, Steven Bechtel, Roger Biesheuvel, Joanne Biesheuvel, James Biesheuvel, Justin Biesheuvel, James J. Birgen, Donna J. Birgen, Joseph J. Birgen, Rebecca A. Birgen, Jeffrey J. Birgen, Gabriel Bueno, Barbara Gutierrez, Lori Gutierrez, Leanne Gutierrez, Lexis Gutierrez, Jimima Bulkley, Elena Bulkley, Kenneth E. Burr, Twyla A. Burr, Bridgett Burr, Staci Burr, Travis Burr, Martha M. Cain, Forrest Cain, Foster Cain, Delbert H. Carson, Clio L. Carson, Ernest Champion, Kathy L. Champion, Lacy J. Champion, Russell Conley, Catherine Conley, Candace A. Conley, Bridgette A. Conley, Chloe Jean Conrad, Michelle L. Parker, Robin A. Parker, Kyle L. Craig, Julianne S. Craig, Darin K. Craig, Dustin Joseph Craig, Michael L. Dennis, Marieta R. Dennis, Sarah M. Dennis, David L. Dorson, Vicky Dorson, Sean Dorson, Amber Dorson, John N. Downey, Patricia G. Downey, Christopher S. Downey, Catherine N. Downey, Cora L. Downey, Conrad J. Downey, Dennis P. Duncan, Marianne L. Duncan, Glenn R. Edwards, Jean M. Edwards, Craig A. Edwards, Cory G. Edwards, Carey J. Edwards, Steven W. Feddersen, Vicki J. Feddersen, Brandi Feddersen, Amber Feddersen, Crystal Feddersen, Lance Feddersen, Howard E. Foskett, Nguyen Foskett, Jack Foskett, Pattu Foskett, Donald P. French, Martha French, Kaylene French, Marlaina French, Thomas Fries, Luanne Fries, Krista Fries, Jarred Fries, Janell Fries, Ron R. Hedlund, Veronica Ray Hedlund, Steven G. Hill, Josefina Hill, Andrew J. Hill, Christopher J. Hill, Joseph L. Hill, James H. Kelley, Alinda K. Kelley, Windy K. Kelley, Charles R. Kiesel, Dawn M. Kiesel, Jennifer D. Kiesel, George A. Labbe, Marilynn C. Labbe, Mary Godley Little, Samuel E. Lord, Sr., Jeraldine D. Lord, Wayne J. Manning, Marie Manning, Thomas Manning, Kenneth L. McCoy and Kathleen G. McCoy, Benny Dial, Brian McCoyk, Kevin McCoy, Jeremiah McCoy, Randall D. Meyer, Cynthia A. Meyer, Stacey Meyer, Travis Meyer, Alicia Meyer, Raymond G. Miller, Connie J. Miller, Shawn L. Miller, Shane T. Miller, Bryan G. Miller, Matt E. Neimatalo, David E. Nelson, Misty K. Nelson, David

the evacuation of 170 homes in that subdivision. As a direct result of the county's evacuation orders, almost all of the plaintiffs lost their homes. Those who did not lose

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J. Nelson, Adam C. Nelson, Bonnie O'Blasney, Jeremy O'Blasney, Randall L. Omvig, Ellen G. Omvig, Jacob J. Omvig, Joshua L. Omvig, Rachel Lou Omvig, Ralph Oswald, Frances J. Oswald, Brad Russell, Roger Pfeil, Linda Pfeil, Ronnie Pfeil, Robert Pfeil, Ryan Pfeil, Richard Pfeil, Christina Pfeil, Virginia Reed, Tyler Miller, Ross Reed, Darrell Rogers, Katherine Rogers, Randy Rogers, William Rogers, Wayne Rogers, Robert R. Rosier, Elsie Rosier, William M. Savage, Diane L. Savage, Scott R. Miller, Wendy L. Miller, Corey J. Miller, Chris M. Savage, Laura D. Savage, Tara L. Savage, Kathy L. Savage, Lyle H. Schillinger, Marjorie Schillinger, Angel Schillinger, Jeremy Schillinger, Melissa Schillinger, David Schillinger, William M. Schmidt, Cindy Schmidt, Luke Schmidt, Zach Schmidt, Robert J. Schweitzer, Debra R. Schweitzer, Heather James, Christy Porter, Dennis Schweitzer, Ricky D. Shank, Lavonna L. Shank, Troy E. Shank, Corey D. Shank, Steven P. Skinner, Solidad R. Skinner, Suzanna J. Skinner, Stephen Skinner, Jr., Howard Spears, Mavis A. Spears, Sherry L. Spears, Michael L. Spears, Victor Shur, Gloria Shur, Daniel Shur, Burl H. Tabor, Luraetta K. Tabor, Dennis J. Uran, Ginger R. Uran, Shawnna Uran, Beau Uran, Abbey Uran, Raymond C. Wall, Adah Wall, Dusty Wall, W. Ben Wieser, Linda Wieser, David Lee Mines, Brian Witt, Cindy Witt, Chance Witt, Riley Witt, Abbey J. Witt, Ricky L. Swanson, Kathy Swanson, Amber Swanson, Aurora Swanson, Whalen Swanson, Gerald K. Wilk, Billie Jo Wilk, Sabrina Wilk, Mary Lou Carroll, Carl Len Black, Jane Black, Jessica L. Black, Jamie L. Black, Billy Genbe Brown, Peggy Jo Brown, Carrie Lynn Brown, Raquel Lea Randolph, Michael William Brown, Sherrie M. Brown, Lacey Brown, Joshua Brown, Steven Joe Dutton, Rachel Ann Dutton, Steven S. Dutton, Alysa Rae Dutton, Danita Jo Dutton, Thomas N. Falk, II, Bonnie Lou Falk, Thomas N. Falk, Jr., Kristofer J. Falk, Sherri Beth Falk, Nicholas S. Falk, Dennes Foy, Pataricia Foy, Christopher Foy, Stacy L. Foy, Gerald D. Green, Thomas E. Harrison, Carol Harrison, Noel E. Harrison, Edward L. Harrison, David Krog, Chrystal Krog, Mitchelle Krog, Hugh A. Polly, Johnnie Marie Polly, Frank Seip, Julene Seip, Afton Seip, Sunny L. Seip, Teresa E. (Paxton) Lish, Travis L. Carroll, Jennifer Kuhn, Leo L. Sherrodd, Charlotte A. Sherrodd, Glenn E. Webb, Leona Webb, Ron Just, Susan Just, Christopher R. Just, Michael A. Just, Nicholas A. Just, Douglas R. Roe, Carol M. Roe, Robert D. Roe, Michael R. Roe, Timothy M. Strawn, Carrie L. Strawn, Stefanie Strawn, Abigail Strawn, Lucas Strawn.

their homes lost all value in the properties. The action below in the United States District Court for the District of Wyoming, made claims for deprivation of constitutional rights under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

In February, 1987, methane and hydrogen sulfide were discovered seeping from the ground in *isolated areas* of the Rawhide Village Subdivision. The seepage was *limited* to the extreme *southern portion* of the subdivision. The source of the gas was most likely coal seams and sandstone formations under the subdivision.

On February 25 and 26, 1987, Campbell County, through its Emergency Manager David Holland, and through the Chairman of the Board of County Commissioners, Bill Barkley, issued an order for evacuation of nine houses in Rawhide Village. All were located on Salt Box Lane, [App. at 41a] the southernmost street in the subdivision. This order was a product of a "Special Meeting" during which *comments from property owners were discouraged.* Commission Chairman Bill Barkley told property owners in attendance, "I think it's important to note that even though we certainly appreciate all of you being here, we would appreciate it being a *listening experience* as much as possible."

At a subsequent "Special Meeting" of the Campbell County Commissioners, twenty-two more homes were added to the list of evacuated residences. Minutes of the meeting mention a "lengthy discussion" of the issues with Rawhide residents, but do not indicate what process the commissioners employed to protect the property rights of the residents. [App. at 43a]

At another "Special Meeting" on March 26, 1987, an additional order of evacuation was issued in which seven of the homeowners were told that they would be "prohibited from returning to your residence." [3] [App. at 45a]

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[3] One family out of this group of seven, the Dorsons, was among the plaintiffs in this action.

Eighteen homeowners were informed that they would be allowed to return home if they chose to do so.[4] [App. at 49a]

Very limited financial assistance was made available for those who chose not to return. [App. at 48a] Six homeowners were told they could return to their homes, were not required to meet any special conditions, and were told that financial assistance would not be made available if they chose not to return to their homes.

During these proceedings in February and March, 1987, nothing was done to protect the procedural and substantive rights of the Rawhide families. "Public hearings" were conducted, but only to inform Rawhide residents what the government had already decided. No mechanism for providing accurate data and information was established. No one knew if a hazard did or did not exist. Accurate scientific information on the hazards or lack of hazards was not made available by the government. And no process to appeal or challenge the decisions of the government was available.

Subsequent events are shocking. The Campbell County Government took steps which immediately, irreversibly, and absolutely *destroyed all the value of the property of the Rawhide families.*

On May 29, 1987, at an "Emergency Meeting"—at which only three of approximately 170 homeowner/occupants of Rawhide Village were present—the Campbell Commissioners ordered the evacuation of the entire subdivision.[5] [App. at 51a] This all-inclusive evacuation was

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[4] Seven of the families so instructed were parties plaintiff to this action, the Justs, Fosketts, Tabors, Wiesers, Craigs, Shanks, and Kelleys.

[5] There was almost no time for discussion or input from the residents, let alone any other procedural safeguards. The meeting commenced at 3:00 p.m., and adjourned at 3:09 p.m.

not based on any specific scientific findings of gas in the subdivision. The entire subdivision was declared to be "uninhabitable for human habitation." No factual basis for the sweeping declaration was stated. The reasons given by Chairman Barkley were two purported cases of hydrogen sulfide exposure and *unconfirmed* reports of readings of methane gas in the northern part of the subdivision.

Later, in their depositions, all the Campbell County Commissioners admitted the reason they ordered an evacuation of the entire subdivision. They said they were induced to take this drastic action by oral representations of an agent of the Federal Emergency Management Agency (F.E.M.A), who purportedly said that if the subdivision was ordered to be completely evacuated, federal disaster relief would be available. *Thus the county completely deprived 170 homeowners of all use of their property so that the county could try to obtain federal funding.*

The irony of the evacuation order was that although it was entered on May 27, 1987, and although it was purportedly based on *an emergency*, Rawhide Village residents were given until July 31, 1987, to vacate the purportedly "uninhabitable" subdivision. It was an attempt by Campbell County authorities to hedge their bets. If the F.E.M.A. assistance came through, the federal government would foot the bill. If not, they could "rescind" their order which they knew they lacked the authority to enter.

On June 2, 1987, the entire subdivision was again declared to be "uninhabitable for human habitation" and ordered to be completely evacuated (but not until July 31, 1987). [App. at 53a] This was in spite of the fact that Commissioner Barkley *admitted* that "We have not been able to document the reading in the northern part of the subdivision." Thus the county admitted that it had no substantive basis in fact for the scope of the evacua-

tion order. There was no emergency—especially not encompassing the entire subdivision.

The county offered almost no assistance to the families summarily evacuated from their homes. The county was willing to provide "alternative shelter for displaced persons through the evening of June 30, 1987," but made no provisions for permanent relocation. [App. at 53a] Minutes of the meeting conducted in a school gymnasium indicate that Commissioner Ostlund told the displaced residents that "We could take a gym like this and set up cots for you and that would fulfill our obligation."

At the meeting where this draconian order was issued, the county severely limited homeowners' right to comment. "We are going to limit the time today for comments," Chairman Barkley said, "but will handle those at the meeting tomorrow night."

The very terms of the evacuation resolution made it clear that there was *no dire emergency warranting such truncated procedures.* The June 2, 1987 resolution ordered no further occupation of the area "from and after 5:00 p.m., *July 31, 1987.*" [App. at 53a] This purportedly "emergency" measure gave the residents over eight weeks before the order took effect. As it turned out, the investigations conducted in this eight-week period demonstrated the absence of a subdivision-wide hazard.

Rawhide residents were left to fend for themselves. They were forced to abandon their homes, purportedly for the public good, but the public made no provision for relocating them or for compensating them for their lost homes. They were denied any effective voice in the county's deliberations, in the name of expediency and emergency, even though the county's own order gave them almost two months to get out of their homes.

In their depositions, the Campbell County Commissioners said they ordered the evacuation because they had

been led to believe that federal assistance money from F.E.M.A. would become available. Campbell County authorities *bet the property rights of the Rawhide families* on the oral representation of a F.E.M.A. representative that federal aid was contingent on a declaration of evacuation and uninhabitability. *And they lost the bet.*

An application for F.E.M.A. assistance was made on behalf of Rawhide residents through the office of Wyoming's Governor Sullivan. Members of the regional office of F.E.M.A. conducted an extensive investigation in Rawhide. The State Health Officer requested an investigation by the Centers for Disease Control, and the results of the C.D.C. investigation were available on June 19, 1987.

F.E.M.A. found that "Essentially, C.D.C. concluded that a *significant health and safety hazard does not currently exist. . . . Most of the subdivision is habitable* at this time. . . . A careful review of your request and the assessments already discussed lead us to the conclusion that a major-disaster declaration under the Disaster Relief Act, PL 93-288, is not warranted." (Emphasis added.) The F.E.M.A. application was denied on June 25, 1987.

Thus, as little as seventeen days after the June 2, 1987, evacuation resolution, the Campbell County Government had the conclusions of the experts at the Centers for Disease Control, which informed them that *most of the subdivision was habitable*, that *no significant health or safety hazard existed*, and that a disaster declaration was not warranted. The response of Campbell County should have been to lift the evacuation orders and their devastating effect. However, Campbell County officials chose to press forward.

On July 3, 1987, at another "Special Meeting" commenced at 11:30 a.m., the Campbell County Commissioners issued another order of evacuation, mandating the total evacuation of persons still living in Rawhide Village

or those returning to get their belongings from their abandoned homes. [App. at 55a] The order affected the southern half of Rawhide Village during a drilling program to be conducted by Wyoming's Department of Environmental Quality. The drilling program was perceived as necessary to appeal to F.E.M.A. finding of June 25, 1987 that no hazards existed in the subdivision. Campbell County was intent on establishing that a hazard existed, through any means possible, rather than taking rational, appropriate actions in light of the F.E.M.A. denial of assistance. Campbell County was still denying the Rawhide homeowners all use of their property.

Then, on July 28, 1987, just three days before the July 31, 1987 deadline established by the June 2, 1987 evacuation resolution, the Campbell County Commissioners rescinded the mandatory evacuation.[6] "[T]he mandatory evacuation of homes in Rawhide Village is suspended until further action is appropriate."

By this time it was too late to protect any of the property interests of the Rawhide residents. Economically compelled to abandon their properties by the June 2, 1987, order, all but approximately eight homeowners in the subdivision had abandoned their properties, entered into deed in lieu of foreclosures agreements, defaulted on their mortgages, or otherwise taken steps that made them unable to return to their homes.

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[6] The trial court characterized this action as an "about face" by the Campbell County Government. App. at 35a.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DISMISSED PLAINTIFFS' DUE PROCESS CLAIMS SINCE THEY PURPORTEDLY ARE 'SUBSUMED' WITHIN PLAINTIFFS' TAKINGS CLAIMS, WHICH PRESENTS A CONFLICT WITH A RULING BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT THAT DUE PROCESS CLAIMS CAN PROCEED IN FEDERAL COURT WHILE PLAINTIFFS PURSUE CONDEMNATION CLAIMS IN STATE COURT ARISING OUT OF THE SAME GOVERNMENTAL ACTION

Plaintiffs sued their county government in the Federal District Court for the District of Wyoming, claiming that the county's evacuation orders, by denying them all use of their property, effectively condemned the homes they owned in the Rawhide Village Subdivision. Plaintiffs also claimed that the procedures by which the county commissioners reached their decision were deficient and denied plaintiffs' procedural due process rights. Plaintiffs also alleged that, since there was no valid basis for the county's evacuation order, that order was arbitrary and unreasonable and violated plaintiffs' substantive due process rights.

The district judge dismissed *all* claims. He reasoned that the plaintiffs had an adequate state remedy, to wit: inverse condemnation. The plaintiffs then instituted a state court action for inverse condemnation. That case is currently proceeding.

The United States Court of Appeals for the Tenth Circuit upheld dismissal of plaintiffs' 'takings' claims as unripe, because plaintiffs had pending the inverse condemnation suit in state court. [App. at 5a] The United States Court of Appeals for the Tenth Circuit also dismissed plaintiffs' due process claims, stating:

> It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process pro-

> tections within the more particularized protections of the Just Compensation Clause. [App. at 6a]

Plaintiffs seek review of the ruling of the United States Court of Appeals for the Tenth Circuit. The effect of that decision was that plaintiffs have no due process rights if the county's action also arguably involves an act of inverse condemnation. Such a ruling is inconsistent with the relationship between the Due Process Clause and the Just Compensation Clause.

The Due Process Clause guarantees protections—both procedural and substantive—for property or liberty interests which are completely *separate from, yet not inconsistent with* the substantive protection given private property under the Just Compensation Clause.

Procedurally, due process requires notice and hearing at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The purpose of this procedural requirement "is to protect . . . use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property. . . ." *Id.*, 407 U.S. at 81. Substantively the Due Process Clause bars arbitrary government decisions and requires governmental action have some rational basis. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

The Just Compensation Clause does not substantively limit governmental action, but merely requires the government pay just compensation for any action which amounts to a taking of private property. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 315 (1987). Any government should be perfectly capable of providing due process when governmental decisions affect citizens' property rights, by following the appropriate procedures and having a rational basis for governmental action (as is required by the Due Process Clause) and *also* providing

just compensation when private property is taken (as is required by the Just Compensation Clause). There is no conflict between these two separate constitutional protections. Therefore each can be respected by government, and each can be a source of civil rights.

The ruling of the United States Court of Appeals for the Tenth Circuit dismissing plaintiffs' due process claims conflicts with *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1317 (1990). In that case, plaintiffs brought claims for inverse condemnation and for denial of substantive and procedural due process for direct governmental action which took control of their property under allegedly emergency conditions. The United States Court of Appeals for the Ninth Circuit dismissed plaintiffs' takings claims as unripe for failure to pursue state court condemnation remedies. However, that Court allowed plaintiffs' claims for denial of due process to proceed in federal court, saying:

> It is of no moment that this due process claim is based on factors that also form the basis of an alleged taking. Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms. *Id.*, 882 F.2d at 1404.

In deciding the present case, the United States Court of Appeals for the Tenth Circuit opaquely discussed the ruling of the United States Court of Appeals for the Ninth Circuit in *Sinaloa*:

> We are aware of the Ninth Circuit case of *Sinaloa Lake Owners Ass'n v. City or Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert denied*, 110 S.Ct 1317 (1990). There, the plaintiffs alleged that their privately owned dam and lake was destroyed by California authorities in violation of the Fifth Amendment as well as the substantive and procedural branches of the Fourteenth Amendment Due Process Clause. The Ninth Circuit dismissed plaintiffs' tak-

> ings claims as being unripe. However, it held that that plaintiffs' procedural and substantive due process claims were viable. Because the facts of that case are so different from the facts of this case, we cannot say that we are in conflict with *Sinaloa Lake*. All that can be said is that under the facts of our case we conclude that the Just Compensation analysis is controlling whereas in *Sinaloa Lake* the Ninth Circuit felt that the conduct there went beyond the penumbra of the Just Compensation Clause. [App., at 7a-8a]

There is no basis to distinguish the present case from *Sinaloa*. To the contrary, the parallels between the two cases are astonishing. If the facts of the present case had been presented to the United States Court of Appeals for the Ninth Circuit, the ruling would have been exactly opposite the ruling below of the United States Court of Appeals for the Tenth Circuit.

The facts of *Sinaloa* and the present case are similar in all relevant factors. Both cases arose out of governmental direct action that denied plaintiffs any use of their property. In *Sinaloa*, a state agency breached a privately owned dam which created a lake, while here the county commissioners denied Rawhide Village residents use of their homes by ordering those homes evacuated.

In both cases, although the government alleged an emergency to justify denial of a pre-deprivation notice and hearing, there was a factual dispute as to whether an emergency existed at the time that the government took control of property. In *Sinaloa*, the lake had subsided by the time the state decided to breach the dam, and was substantially below the high level which had threatened downstream homes. In the instant case, in meetings held over several months to discuss gases leaking in the Rawhide subdivision, the county had only scattered and unconfirmed reports of gases in the northern part of the subdivision. The evacuation order itself

undercut any claim of an emergency, since the June 2 order directed evacuation of the subdivisions by July 31.

Plaintiffs in both *Sinaloa* and the present case brought claims under the same constitutional provisions. In both cases, plaintiffs brought takings claims for the loss of their property, which the federal courts found to be unripe for failure to pursue state condemnation proceedings. In both cases, the plaintiffs also brought due process claims, alleging that they were denied adequate notice and hearing. In *Sinaloa*, plaintiffs were allowed to pursue these due process claims in federal court, while in the instant case the appellate court dismissed such claims on the basis that due process standards were subsumed within the protections of the Just Compensation Clause.

In concluding that plaintiffs' due process claims should be dismissed, the United States Court of Appeals for the Tenth Circuit relied on two of this Court's precedents, neither of which involved claims under the Just Compensation Clause and the Due Process Clause. The United States Court of Appeals for the Tenth Circuit interpreted *Graham v. Connor*, 490 U.S. 386 (1989) and *Whitley v. Albers*, 475 U.S. 312, 327 (1986) as support for its ruling "subsuming" due process protections within constitutional protections requiring just compensation for the taking of property.

Neither *Graham* nor *Whitley* provide such support. In *Whitley*, the plaintiff was a prisoner injured by guards in a prison riot. He brought claims under the Eighth Amendment and the Due Process Clause. This Court ruled that any conduct which "shocks the conscience" and thus constitutes a violation of substantive due process must also be "inconsistent with contemporary standards of decency" in violation of the Eighth Amendment. *Whitley v. Albers*, *supra*, 475 U.S. at 327. Thus that case involved two constitutional clauses that were coterminous and overlapping.

In the instant case, the relationship is quite different between the Due Process Clause and the Just Compensation Clause. The Due Process Clause places certain requirements—of notice and hearing, and of rationality—on government action, which are quite different from the Just Compensation Clause's requirement that the government pay for taken private property. Thus *Whitley v. Albers*, *supra*, does not support the rulings of the court below.

In *Graham*, this Court was confronted with a different question: how to interpret two constitutional provisions which, as interpreted by the courts, placed conflicting demands upon the government. The plaintiff in *Graham* brought claims against the police for use of excessive force in an investigatory stop. This Court ruled that the Fourth Amendment's guarantee of the right to be secure against unreasonable seizures was applicable, rather than a four part test for denial of substantive due process which had been devised by the courts. *Graham v. Connor*, *supra*, 490 U.S. at 394-95. This ruling was based on finding that the four part substantive due process test "is incompatible with a proper Fourth Amendment analysis." *Id.*, 490 U.S. at 397. The Court ruled that where two constitutional provisions set out incompatible standards for government conduct, the courts should measure the legality of governmental conduct under the constitutional provision resting on a more explicit textual source of constitutional protection.

No such incompatibility problem exists in the present case. It would have been perfectly possible for Campbell County to provide plaintiffs with procedural due process *and* just compensation for the taking of their property. Campbell County failed to provide plaintiffs with their rights under either constitutional clause. Even if plaintiffs cannot yet bring their just compensation claims (i.e., inverse condemnation) in federal court because the Just Compensation Clause requires that they exhaust their state court remedies, plaintiffs should not be barred

from bringing federal claims for their distinctly separate claims for denial of procedural and substantive due process.

II. THE ALTERNATE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' DUE PROCESS CLAIMS IS INCONSISTENT WITH THIS COURT'S PRECEDENTS BALANCING THE FACTORS WHICH CAN BE CONSIDERED IN DETERMINING WHAT PROCESS IS DUE

The federal appeals court below ruled that, since the county's June 2 evacuation order did not take effect until July 31, this delay "belies the defendants' claim that they were confronted with such an emergency that a predeprivation hearing could not be provided." [App. at 8a] That court then reversed field and ruled that the "urgency" of the situation warranted truncating plaintiffs' due process rights. Such a ruling is inconsistent with this Court's precedents determining what process is due.

When governmental action affects property interests, the amount of process which is due "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Factors to be considered include (1) the importance of the private interest, (2) the length or finality of the deprivation, (3) the likelihood of governmental error, and (4) the magnitude of the governmental interests involved. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18-19 (1978). None of these four factors support limiting the homeowners' due process rights.

The private interest at stake was of the highest order. Campbell County's evacuation order denied 170 families the possession and use of their *homes*, an interest which must be given the ultmost importance and protection.

Nor was the deprivation temporary. The evacuation order by its terms barred plaintiffs after a certain date from *any* use of their property.

The county proceeded with its evacuation order in spite of an extremely high likelihood of governmental error. The commissioners knew that they had only scattered and unconfirmed readings of gases in the northern part of the subdivision. They knew that adequate testing had not been conducted to determine the scope of the problem. Within days of the entry of the evacuation order, the Centers for Disease Control informed the county that a generalized hazard did not exist. Yet in spite of this lack of evidence to support the order, the county maintained its order evacuating 170 families from their homes.

The county was also contending with substantial governmental interests, since the problem of leaking gases potentially threatened public life and safety. However, this interest was *not* furthered by truncating the homeowners' due process rights. The county, by the terms of its own evacuation order, admitted that the public health and safety did not require evacuation for over eight weeks. The county could have better protected the public health and safety by using that eight week period to investigate the situation, to air landowners' concerns, to undertake a thorough testing program, and to determine which houses, if any, required evacuation and what other measures might protect public health and safety—in other words to provide the homeowners with a fully panoply of due process protections before denying them all use of their homes. Instead of taking such an approach, which would assure that the evacuation order was properly tailored to protect public health and safety, the county hastily issued an evacuation order at a county commissioners' meeting where homeowners were denied the right to speak. For weeks afterward the county stubbornly clung to that order in the face of mounting evidence that such measures were unwarranted.

There is only *one* reason why the county insisted and continued to insist on issuing an evacuation order, even after the Centers for Disease Control informed the county that most of the subdivision was habitable, that no significant health or safety hazard existed, and that a disaster declaration was not warranted. The county stuck with its evacuation order so that the county could conduct a drilling program *to support the county's appeal for federal disaster relief.* The county's reasons for limiting the homeowners' due process rights and continuing the evacuation order in effect had *nothing* to do with the public health and safety. The county's reasons had every thing to do with the county's ability to obtain federal monetary assistance. This sort of governmental interest in protecting the public fisc cannot justify denying property owners any effective chance to be heard prior to deprivation of their property. *Goldberg v. Kelly*, 397 U.S. 254, 264-71 (1970) (welfare recipients' interest in avoiding erroneous deprivation of subsistence support outweighs any state interest in preventing increased fiscal and administrative burdens, and thus appropriate notice and hearing required prior to deprivation of benefits).

The entire purpose of the constitutional guaranty of due process is "to maintain an ordered society that is also just." *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). The requirement of notice and hearing is intended "to minimize substantively unfair or mistaken deprivations of property . . ." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). The current case is a perfect example of the kind of decisions which government can reach when such protections are not provided.

Here Campbell County denied the Rawhide Village homeowners of all use of their property in a hastily adopted resolution, without providing the homeowners an opportunity to be heard. Clearly there was no basis for such haste, since the evacuation order itself did not take effect for over eight weeks. During that eight week period

it became progressively clear that no threat to public health or safety existed to justify the evacuation order. Yet even then, the county refused to rescind its order, or to provide the homeowners with full procedural protections, in the form of formal notice and hearing. The commissioners clung to their evacuation order, more concerned with the county's interest in obtaining federal disaster relief funds than with the impact on the homeowners. Finally, after it was too late for most of the subdivision's homeowners, the county acknowledged its mistake and rescinded its order. By that time, most of the plaintiffs had lost their property. If the county had taken the time to follow more complete and even handed procedures in its deliberations, the plaintiffs would still own their homes.

CONCLUSION

For these reasons, plaintiffs respectfully request this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-8100 & 90-8014

H. DOUGLAS MILLER, *et al.*,
Plaintiffs-Appellants,

v.

CAMPBELL COUNTY, *et al.*,
Defendants-third-party-plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Third-party-defendants.

Appeal from the United States District Court
for the District of Wyoming
(D.C. Nos. C89-0134-J)

[Filed Sep. 24, 1991]

Gary L. Shockey of Spence, Moriarity & Schuster, Jackson, Wyoming for Plaintiffs-Appellants.

Rick A. Thompson (Richard J. Barrett assisting on the brief) of Hathaway, Speight, Kunz, Trautwein & Barrett, Cheyenne, Wyoming for Defendants-Appellees.

Before MOORE, TACHA, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

The plaintiffs-appellants, former homeowners in the Rawhide Village subdivision of Campbell County, Wyoming, seek damages for harm suffered when Rawhide Village was declared unhabitable by the county commissioners of Campbell County. The plaintiffs filed suit against the Campbell County commissioners in the United States District Court for the District of Wyoming raising a battery of interrelated constitutional claims.[1] The district court granted the defendants' motion for summary judgment and dismissed all the plaintiffs' claims.

The plaintiffs on appeal argue that the district court erred in dismissing their Fifth Amendment takings claim and their Fourteenth Amendment substantive and procedural due process claims. We agree with the district court that the plaintiffs' takings claim is not ripe for review. We also find that the district court properly dismissed the plaintiffs' substantive and procedural due process claims. We therefore affirm the district court.

FACTS

In February 1987, methane and hydrogen gasses were discovered seeping from the ground in the southern end of the Rawhide Village subdivision located in Campbell

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[1] In addition to naming the Campbell County commissioners as defendants, the plaintiffs sued the County of Campbell, the Board of County Commissioners of the County of Campbell, the Campbell County Sheriff's Department, the Campbell County Health Department, the Campbell County Fire Board, and the Campbell County Emergency Services Agency. These defendants in turn filed third party actions against the United States, the Federal Emergency Management Agency, Julius W. Becton, Jr. (the Director of the Federal Emergency Management Agency), David P. Grier, IV (the Coordinating Officer for Rawhide Village for the Federal Emergency Management Agency), and Amax Coal Company.

County, Wyoming. On February 24 through 26, 1987, the county commissioners ordered the immediate evacuation of nine homes in the subdivision. On March 6, 1987, an additional twenty-two homes were ordered evacuated. Later, on March 26, all but seven of these thirty-one displaced homeowners were allowed to return to their homes.

By the end of May, it had been reported that a number of Rawhide residents were contracting strange maladies. In addition, the County Health Officer, Dr. George B. McMurtrey, sent a letter to the Governor of Wyoming suggesting that he declare the subdivision a disaster area based partly upon "information he had received from primary care physicians related to specific problems within the Rawhide Village subdivision." On May 29, the commissioners held an emergency meeting and passed a resolution declaring the subdivision uninhabitable. The commissioners nevertheless decided to wait until June 2 to make a final decision as to the timetable they would adopt for the evacuation. On June 2, the commissioners passed a resolution requiring that the subdivision be evacuated by July 31, 1987.

At the end of July, the Federal Emergency Management Authority ("FEMA") issued a statement to the effect that the subdivision was *not* uninhabitable. As a result, on July 28, 1987, the commissioners rescinded the July 31 deadline for evacuation. However, the commission left intact that portion of the June 2 resolution declaring the subdivision to be uninhabitable. Finally, on September 4, 1987, President Reagan declared the subdivision a disaster area, thereby paving the way for the disbursement of federal relief aid to the Rawhide residents.[2]

The plaintiffs contend that the Rawhide subdivision was not uninhabitable and that the commissioners declared the

[2] It is not clear from the record whether a final evacuation order was entered.

subdivision uninhabitable only in order to procure federal assistance from FEMA. They claim, therefore, that the defendants wrongly deprived them of their property in violation of the Constitution. The United States District Court for the District of Wyoming granted the defendants' motion for summary judgment and dismissed the plaintiffs' claims.[3] The plaintiffs now appeal to this court.[4]

DISCUSSION

The plaintiffs have raised three constitutional claims. They claim first that the evacuation orders of May 29 and June 2 constituted a taking in violation of their Fifth Amendment rights as incorporated against the states through the Fourteenth Amendment. Second, they claim that their Fourteenth Amendment substantive due process rights were violated by the defendants' actions.

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[3] There are two other related cases that were filed in the United States District Court for the District of Wyoming. The plaintiffs filed suit against the Amax Coal Company, alleging that it had caused the methane and hydrogen gas to leak into the subdivision. Amax operated a large coal mine operation located near the subdivision. This case was settled for an undisclosed amount on April 26, 1989.

In addition, one of the homeowners, H. Douglas Miller, filed suit against the defendants on the grounds that he was improperly denied access to his home and was arrested when he tried to gather some of his tools. The district court granted the defendants' motion for summary judgment and dismissed his claims. *See Miller v. Campbell County*, 722 F. Supp. 687 (D. Wyo. 1989). In the instant case, the district court, in its Order granting summary judgment for the defendants, adopted the legal conclusions and factual findings from the earlier *Miller* case.

[4] On their original notice of appeal, the plaintiffs used an "et al." designation for everyone but the first named plaintiff-appellant. However, the district court granted the plaintiffs' timely motion to extend their time to file the notice of appeal, and they filed a notice of appeal that correctly identified every party appealing the district court's summary judgment dismissal. The first defective notice of appeal was never dismissed. As a result, we have two separate docketing numbers for these two appeals.

Third, they claim that their Fourteenth Amendment procedural due process rights were similarly violated. We will address each of these in turn.[5]

I. Fifth Amendment Takings Claim

The plaintiffs claim that the defendants violated their Fifth Amendment rights by "taking" the plaintiffs' homes from them. The district court dismissed this claim on the grounds that it was not yet ripe for review. We agree. The Fifth Amendment does not prohibit the government from taking its citizens' property; it merely prohibits the government from taking property without paying just compensation. U.S. Const. amend. V. Before a federal court can properly determine whether the state has violated the Fifth Amendment, the aggrieved property owner must show first that the state deprived him of his property, and second, that the state refused to compensate for his loss. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-97 (1985). In those states that allow aggrieved property owners to bring an inverse condemnation action in order to recover compensation for property taken by the state, a Fifth Amendment takings claim is not ripe until the aggrieved property owner "has used the procedure and been denied just compensation." *Id.* at 195.

In the instant case, the plaintiffs have pending under Wyoming law an inverse condemnation action to recover compensation for the loss of their homes. Appellee's Br. at 13. Because the plaintiffs have not yet been turned away empty-handed, it is not clear whether their property has been taken without just compensation. Therefore, under *Williamson County*, we affirm the district court holding that plaintiffs Fifth Amendment takings claim is not yet ripe for review in federal court.

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[5] In light of our rulings on these issues, *infra*, we need not address the issue of qualified immunity.

II. Due Process Claims

In addition to invoking the Just Compensation Clause of the Fifth Amendment, the plaintiffs contend that the defendants' actions violated their Fourteenth Amendment due process rights. The Fourteenth Amendment embodies three different protections: (1) a procedural due process protection requiring the state to provide individuals with some type of process before depriving them of their life, liberty, or property; (2) a substantive due process protection, which protects individuals from arbitrary acts that deprive them of life, liberty, or property; and (3) an incorporation of specific protections afforded by the Bill of Rights against the states. *See Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring).

Because the Just Compensation Clause of the Fifth Amendment imposes very specific obligations upon the government when it seeks to take private property, we are reluctant in the context of a factual situation that falls squarely within that clause to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause.[6] The Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), supports our analysis. In *Graham*, the plaintiff accused law enforcement officers of injuring him during an investigatory stop. He claimed that the excessive force used violated both his Fourth Amendment and his Fourteenth Amendment substantive due process rights. The Supreme

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[6] We need not address whether a taking might ever violate substantive or procedural due process without violating the Just Compensation Clause. We hold only that there is nothing in this record that would warrant a separate due process analysis over and above a consideration of the plaintiffs' more precise claims based on the Just Compensation Clause.

Court rejected his Fourteenth Amendment claim: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395; *cf. Whitley v. Albers*, 475 U.S. 312, 327 (1986) (refusing to consider Fourteenth Amendment Due Process claim by prison inmate for excessive force because Eighth Amendment "serves as the primary source of substantive protection to convicted prisoners" in such cases).

We are aware of the Ninth Circuit case of *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990). There, the plaintiffs alleged that their privately owned dam and lake was destroyed by California authorities in violation of the Fifth Amendment as well as the substantive and procedural branches of the Fourteenth Amendment Due Process Clause. The Ninth Circuit dismissed the plaintiffs' takings claim as being unripe. However, it held that the plaintiffs' procedural and substantive due process claims were viable.[7] Because the facts of that case are so different from the facts of this case, we cannot say that we are in conflict with *Sinaloa Lake*. All that can be said is that under the facts of our case we conclude that the Just Compensation analysis is controlling whereas in *Sinaloa Lake* the Ninth Circuit felt that

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[7] The Ninth Circuit attempted to distinguish *Graham*: "*Graham* does not, however, bar substantive due process analysis altogether. A plaintiff may still state a claim for violation of substantive due process where it is alleged that the government has used its power in an abusive, irrational or malicious way in a setting *not encompassed by some other enumerated right*." *Sinaloa*, 882 F.2d 1408-09 n.10. (Emphasis added). In the instant case, the plaintiffs' due process claims are encompassed within the Just Compensation Clause.

the conduct there went beyond the penumbra of the Just Compensation Clause.

In any event, even if we were to evaluate plaintiffs' substantive and procedural due process claims separately from their Just Compensation claim, we would find no due process violation here.

The Supreme Court has stated that "due process ordinarily requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." *Hodel v. Virginia Surface Mining and Recl. Ass'n*, 452 U.S. 264, 299 (1981) (citing *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) *overruled on other grounds by Daniels*, 474 U.S. at 330-31; *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971)). However, where the state is confronted with an emergency, it may deprive an individual of his or her property without first providing a hearing. *Hodel v. Virginia Surface Mining and Recl. Ass'n*, 452 U.S. at 299-300 (1981).

The facts of this case do not bear out the defendants' claim that they were confronted with an emergency of such magnitude that they could totally avoid any procedural due process obligations that they may have under the Fourteenth Amendment. Although the plaintiffs were told on May 29 and June 2 that their homes were uninhabitable, the evacuation was not set to occur until July 31—two months later. This two-month long delay belies the defendants' claim that they were confronted with such an emergency that a predeprivation hearing could not be provided.[8]

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[8] In determining that the emergency exception was applicable, the district court placed a great deal of weight on the plaintiffs' pleadings filed in the Amax case. In the Amax case, the plaintiffs sued the Amax Coal Company alleging that Amax was responsible for the significant seepage of a substantial amount of methane and hydrogen gasses into the subdivision. The plaintiffs claimed that as a result, they suffered substantial property loss, personal injuries, and emotional injuries. Here, the district court believed that

Nevertheless, it is clear that plaintiffs had at least two opportunities to present their position orally to the county commissioners, and they had ample notice of the pending orders to vacate such that they could have made written submissions to the county commissioners had they so wished.[9] This process, which was available to plaintiffs, must be considered in the context that the defendants had a legitimate governmental duty to act in this situation with some urgency. Further, the condemnation process (or a revival of plaintiffs' Just Compensation claim should condemnation prove to be inadequate) offers the plaintiffs a sufficient post-deprivation hearing to obtain just compensation for the loss of their property. In this particular context, we hold that plaintiffs were offered adequate procedural due process.

With regard to plaintiffs' substantive due process claims, we similarly find no violation. The defendants

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these pleadings established that the commissioners were confronted with an emergency.

The plaintiffs' pleadings from the Amax case constitutes some evidence that there was an emergency. However, because the district court was deciding a summary judgment motion, it was required to resolve all conflicts in the evidence in favor of the nonmoving party—in this case the plaintiffs. Because the prior pleadings evidence taken from the Amax case conflicted with the evidence supporting the plaintiffs' claim that there was no emergency, the district court should not have granted summary judgment for defendants on the basis of the emergency exception.

[9] The taking did not occur when the resolutions were adopted; rather the taking occurred when the plaintiffs were actually required permanently to vacate their premises. See *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984). There, the Court rejected the aggrieved property owner's claim that the taking occurred when the government initiated condemnation proceedings by filing a notice of *lis pendens*. *Id.* at 14-15. Instead, the Court held that the taking occurred at the time the title was transferred to the government in exchange for compensation. The Court noted that until the title passed, the government's "interference with petitioner's property interests [was not] severe enough to give rise to a taking . . . ." *Id.*

had an obvious need to act with considerable dispach because of the potential danger to its citizens. The defendants' actions were reasonable and measured, with appropriate concern for the situation and the interests of all involved. We cannot say on this record that the defendants' actions were arbitrary, capricious and unreasonable.

CONCLUSION

The district court order is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. C88-0194J

H. DOUGLAS MILLER,

Plaintiff,

v.

CAMPBELL COUNTY, WYOMING; CAMPBELL COUNTY COMMISSIONERS, BILL BARKLEY, THOMAS OSTLUND, and MICKEY WAGENSEN,

Defendants.

MEMORANDUM OPINION AND
ORDER GRANTING SUMMARY JUDGMENT

[Filed Oct. 2, 1989]

The plaintiff, H. Douglas Miller, seeks damages under Section 1 of the Ku Klux Klan Act of 1871, 42 U.S.C. Section 1983, for alleged deprivations of his civil rights under the Fourteenth Amendment to the United States Constitution. The case arose after county officials discovered that lethal gasses, hydrogen sulfide, hydrogen selenide and methane, were seeping into the Rawhide subdivision where the plaintiff owned a home. The gasses, evidently, were also seeping into the homes located in the subdivision. The subdivision is located in Campbell County, Wyoming, and is adjacent to a large open pit coal mine owned by Amax Coal Company. The plaintiff and other persons owning homes in the subdivision previously sued Amax in this court under various tort theories, alleging that Amax's mining operations caused the dangerous gasses to seep into their homes thereby causing them injuries to their property and persons. The court

dismissed that action on April 26, 1989, because of a settlement reached by and between the parties. Miller is now suing Campbell County and its commissioners, alleging that the commissioners violated his constitutional rights when, in response to the gas problems, they voted to pass a resolution that ordered the property owners of the Rawhide subdivision to evacuate their homes.

The county discovered the presence of dangerous gasses in the subdivision in February, 1987. After consulting with federal and state agencies concerning health and safety problems posed by the gas seepage, the county conducted drill tests that confirmed the presence of methane and hydrogen sulfide gasses. In response to the problem, the county commissioners passed two resolutions declaring the Rawhide subdivision uninhabitable and ordered, by their first resolution, that some residents evacuate their homes by July 3, 1987.

The defendants passed the first resolution on June 2, 1987, and attempted to order a permanent evacuation of the subdivision on or before July 31, 1987. The resolution calling for a permanent evacuation however was soon rescinded. On June 3, the Governor of the State of Wyoming declared the Rawhide subdivision a disaster area and thereby activated the state emergency operation plan to help coordinate the emergency assistance to persons living in the Rawhide subdivision. In response to a drilling program conducted by the Wyoming Department of Environmental Quality (DEQ) within the subdivision, the county commissioners passed a second resolution on July 3, 1987, ordering the immediate evacuation of those persons residing near the drilling sites, which included the plaintiff. This is the resolution about which the plaintiff now complains. The commissioners passed it after determining that the DEQ's drilling augmented the gas danger to the Rawhide residence. To enforce this order, the commissioners ordered that the Campbell County Sheriff's Office erect supervised road blocks at the en-

trances to the evacuated parts of the subdivision. The county therefore physically deprived the plaintiff, at least temporarily, of all use of his property.

The plaintiff, who operated a small business in his home, refused to leave until July 6. He initially refused to leave unless the county had compensated him for lost business income. After attending a meeting with the county commissioners the next day, on July 7, the plaintiff attempted to return to his home, but was arrested by sheriff deputies when he traveled through a barricade to the entrance of the subdivision. The plaintiff spent the night in jail and was released the following morning.

He then filed this action, alleging that the county and its commissioners deprived him of his liberty and property interests without due process of law in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The defendants have moved for summary judgment on the ground they are entitled to both qualified and absolute immunity.

The civil rights statute under which the plaintiff sues provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory for the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To prevail under section 1983 the plaintiff must show he was deprived of a federally secured right by someone acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Wise v. Bravo*, 666 F.2d 1328, 1331 (10th Cir. 1981).

Action under state law includes a "[m]isuse of power, possessed by virtue of state law, and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961).

It is well established that Section 1983 does not create substantive rights, but merely provides remedies for deprivation of rights established elsewhere. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Thus, violation of a state law ordinarily is not cognizable under § 1983. It is cognizable, however, when a state law supplies the basis for a constitutional right,—for example, where state law creates a property right that the fourteenth amendment protects, such as the right to own real property. *Davis v. Scherer*, 468 U.S. 183, 193 (1984). It is, of course, axiomatic that the due process clause of the fourteenth amendment requires that the states employ fair procedures in effecting a deprivation of property. *Williamson County Regional County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 205 (1985) (Stevens, J. concurring); *Cleveland Board of Education v. Loudermilk*, 470 U.S. 532, 541 (1985); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989).

In a Section 1983 action the plaintiff initially must show that the conduct about which he complains was committed by a person acting under color of state law and that the conduct deprived him of rights, privileges, or immunities guaranteed by the constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). It is undisputed that in passing the resolutions at issue, the defendants acted under color of law. They hold their positions as county commissioners by virtue of state law and as such are in positions of considerable authority. Thus the court must focus on whether the defendants deprived the plaintiff of a federally secured right, the second prong of the test articulated by *Par-*

ratt. The plaintiff asserts that the defendants' resolution requiring that he evacuate his residence deprived him of property without procedural due process of law because presumably it was passed without any notice to him and an opportunity for him to be heard.

Generally, the right to procedural due process under the fourteenth amendment requires that the state provide adequate notice and a hearing "at a meaningful time and in a meaningful hearing" prior to the deprivation of a property right. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "Ordinarily, due process of law requires an opportunity for some kind of hearing prior to the deprivation of a significant property interest." *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 19 (1978). *See also Hodell v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 299 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). There are, however, two exceptions to this general rule requiring predeprivation procedural due process.

The first exception is where the deprivation of property is the "result of a random and unauthorized act by a state" actor, who, through negligence, deprives someone of a federally secured right. *Parratt*, 451 U.S. at 541. In *Parratt*, the court held that this type of deprivation does not violate one's procedural due process rights absent a showing that post-deprivation procedures for redress are inadequate or "that it was practicable for the state to provide a predeprivation hearing." 451 U.S. at 543. In *Parratt*, state prison guards negligently lost an inmate's personal property, making it impossible to provide a predeprivation hearing. *Parratt* therefore is inapplicable here because the actions of the defendants were deliberate and calculated as opposed to random and unauthorized.

The second exception to predeprivation procedural due process is where an emergency exists requiring the state

to take summary action. The taking of property without prior notice and an opportunity to be heard does not violate due process where the deprivation is the result of summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare. *Sinaloa Lake Owners Association v. City of Simi Valley*, 864 F.2d 1475, 1482 (9th Cir. 1989) (citing *Hodel*, 452 U.S. at 299-300; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 667-80 (1974); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *Yakus v. United States*, 321 U.S. 414, 442-43 (1944); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315-21 (1908). Thus, for example, in *North American Cold Storage*, the Supreme Court upheld the city of Chicago's right to seize and destroy unwholesome food without a predeprivation hearing because the right to procedural due process was outweighed by the city's police powers to protect the public health in the face of an emergency posed by the potential distribution of unwholesome food. 211 U.S. at 315-16. In that situation, post-deprivation due process was sufficient because the property owner could later sue those responsible for the deprivation and receive damages if the defendants failed to show that the food was in fact unwholesome and therefore subject to seizure. *Id.* Ordering the evacuation of a neighborhood because of the danger posed by the presence of admittedly lethal gasses appears to fall within the emergency action exception. In deciding this issue, the court looks first to see whether the plaintiff has adequate post-deprivation remedies.

The present case is very similar to a series of cases that arose in South Dakota. In *Poage v. City of Rapid City*, 431 F.Supp. 240 (D.S.D. 1977), property owners sued the city under section 1983 after the city bulldozed plaintiff's building, which had been damaged in a flood disaster. The city and county destroyed the building under its police powers, which they invoked under South

Dakota's Emergency Disaster Act,[1] the provisions of which are identical in many relevant instances to the Wyoming Disaster and Civil Defense Act.[2] In that case the plaintiffs argue that damages under § 1983 was their only realistic remedy because under the South Dakota Emergency and Disaster Act cities and counties had governmental immunity for any taking or damaging of private property done in the performance of civil defense activities.[3] The district court, however, abstained from deciding the issue because a separate case presenting the issue of governmental immunity under the same circumstances was pending before the state supreme court.

That case was *City of Rapid City v. Boland*, 271 N.W. 2d 60 (S.D. 1978). As in *Poage*, the plaintiffs sought compensation for the value of their home, which the city destroyed pursuant to its police powers after it summarily determined that the house, which had been damaged in the same flood as in *Poage*, was a public nuisance, presenting an imminent danger to the public health, safety, and welfare. In deciding whether political subdivisions had governmental immunity for taking or destroying prop-

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[1] S.D. Codified Laws Ann. §§ 33-15-1 to 33-15-45.

[2] Wyo. Stat. §§ 19-5-101 to 19-5-116 (1977).

[3] S.D. Codified Laws Ann. § 33-15-38. That statute provided:

> All functions under this chapter and all other activities relating to civil defense are hereby declared to be governmental functions. Neither the state nor any political subdivision thereof, nor other agencies, nor, except in cases of willful misconduct, gross negligence, or bad faith, any civil defense worker complying with or reasonably attempting to comply with this chapter, or any order, rule or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of this state, shall be liable for the death of or injury to persons, or damage to property, as a result of such activity.

This statute is identical to Wyo. Stat. § 19-5-113(a)(i) (1977) of Wyoming's Disaster and Civil Defense Act.

erty during the performance of civil defense functions, the South Dakota Supreme Court construed a provision of the state's civil defense act, which was *in hoc verba* with a parallel provision in Wyoming's Disaster and Civil Defense Act.[4] The court found that the statute, allowing for the taking or destroying of private property during emergencies, was nonetheless limited by the state's constitution, which, like Wyoming's, contained just compensation and due process clauses.[5] The court held that the relevant provision in the state's Civil Defense Act, § 33-15-38, which is *in hoc verba* with Wyo. Stat. 19-5-113(a)(i), only grants immunity under limited circumstances. Relying on the state's constitution as well as the holding in *North American Cold Storage* v. *Chicago*, 211 U.S. 306 (1908), the court held that the statute granted immunity only when the defendants could establish that the property was destroyed or taken to prevent an imminent public catastrophe or to abate a public nuisance.

Although the Wyoming Supreme Court has never ruled on this issue, the court finds that the plaintiff has an adequate post-deprivation remedy. The Wyoming Constitution, like South Dakota's, prohibits the taking and damaging of private property for a public or private use without just compensation. Wyo. Const. art. 1, section 33. It also prohibits the taking of property without due process of law. Wyo. Const. article 1, section 6. Additionally, Wyoming allows for inverse condemnation actions "when a person possessing the power of condemnation takes possession of or damages land in which he has no interest. . . .". Wyo. Stat. § 1-26-516 (1981). A person prevailing under this statute is also entitled to litigation

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[4] Wyo. Stat. § 19-5-113(a)(i).

[5] Art. VI, Section 13 of the South Dakota Constitution provides "private property shall not be taken for public use, or damaged, without just compensation . . . ." Article VI, Section 2 of that state's constitution provides that "no person shall be deprived of life, liberty or property without due process of law."

expenses. Here the county is a person possessing the power of condemnation and would therefore be subject to an inverse condemnation action. Wyo. Stat. § 1-26-801 (1988). The court is compelled to conclude that the plaintiff has not been been deprived of a federally secured property right because the defendants took his property during an emergency for which the state of Wyoming plainly provides an adequate post-deprivation remedy.

In his brief, the defendant asserts that the emergency exception rule is unavailable to the defendants because there was in fact no emergency. The plaintiff's assertion, however, is belied by his prior complaint against Amax Coal Company, where in his amended complaint he alleged that "since the presence of gas is in *significant amounts* was noted in early 1987, the plaintiffs have suffered damages in the form of property losses, *personal injuries*, and consequential emotional injuries. The combined actions of the defendant [Amax Coal Company] have resulted in a total devaluation of all property values in the Rawhide subdivision and surrounding areas." According to the complaint in the prior lawsuit, the residents of the Rawhide subdivision began to notice in early 1987 "significant seepage of methane and hydrogen sulfide gasses from the ground *into* and around *their residences*." [6] *Id.* (emphasis supplied). By July 1987 another poisonous gas, hydrogen selenide, also was confirmed to be seeping from the ground into the subdivision. In their opposition to Amax's motion for summary judgment, the plaintiffs argued "that as a group the emotional distress suffered by Rawhide residents has surpassed that of the victims of some of our country's best known technologi-

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[6] Hydrogen sulfide is "a colorless flammable very poisonous gas H_2S that has a disagreeable odor suggestive of rotten eggs . . . ." Webster's Third New International Dictionary of the English Language Unabridged (3d ed. 1976). Hydrogen selenide is also a poisonous gas. *Id.* Methane, on the other hand, is a gas that become explosive when mixed with air or oxygen. *Id.*

cal disasters." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 20. *Miller v. Amax*, C87-0300. Finally, in their final pretrial memorandum the plaintiffs stated as follows:

> The situation was intolerable for Rawhide residents. On February 26, 1987, the Campbell County Commissioners ordered the evacuation of several homes along the southernmost street in the subdivision, Salt Box Lane. Further evacuations were ordered in early March. These evacuations were based on the recommendations of county and state officials, as well as *Mr. Chester McKee, one of the expert witnesses for Amax* in this case. Rawhide residents were experiencing increased rates of physical illness and extreme psychological stresses. Throughout March, April, and May, county, state, and federal officials contemplated further evacuation of the subdivision. County health officials, as well as county engineering and fire officials, all concluded that there were fire, explosion, and health hazards throughout the subdivision.

In the face of these admissions of which the court has taken judicial notice it is difficult to understand plaintiff's position that no emergency existed requiring an evacuation of the Rawhide subdivision. In any event, if no emergency existed, the plaintiff is no doubt entitled to damages in a post-deprivation proceeding in state court. As noted in *North American Cold Storage*, the defendants clearly have the burden of showing in a post-deprivation action that an emergency in fact existed.

Alternatively, the plaintiff argues that even if there was an emergency, the county commissioners lacked the police power to order an evacuation. In Wyoming, a county is a political subdivision "of the state created to aid in the administration of government and is not a sovereign entity" and has only those "powers expressly granted by statute or *reasonably implied* from powers

granted." *Haddenham v. Board of County Commissioners of Carbon County*, 679 P.2d 429, 431 (1984) (citing *Hyde v. Board of County Commissioners of Converse County*, 47 Wyo. 101, 31 P.2d 75 (1934)). The State of Wyoming has inherent police powers to protect the public health, safety, and welfare, which it clearly may delegate to its political subdivisions. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Schoeller v. Board of County Commissioners of the County of Park*, 568 P.2d 869, 876-77 (Wyo. 1977) (counties have those police powers delegated to them expressly or impliedly by the state constitution or legislature).

The plaintiff asserts that a county, through its commissioners, has only those powers specifically enumerated in Wyo. Stat. § 18-3-504(a). Those powers include those necessary to care for county property, to settle all accounts, to construct and maintain county buildings, appropriate and levy taxes, to exercise eminent domain for public roads and to grant licenses for ferries, toll bridges, and toll gates. Wyo. Stat. § 18-3-504 (1977). County commissioners also have those powers prescribed by law. Wyo. Stat. § 18-3-504(a)(viii).

The county agrees that the Wyoming Disaster and Civil Defense Act grants broad police powers to political subdivisions to protect the public health, safety, and general welfare in times of emergencies. Wyo. Stat. §§ 19-5-101 to 19-5-116 (1977). The court agrees the act contemplates "joint participation by local, state, and federal governments in emergency and disaster services." *Boland v. City of Rapid City*, 315 N.W.2d, 496, 500 (S.D. 1982) (interpreting South Dakota's Emergency and Disaster Service Act, which is virtually patterned *in hoc verba* after Wyoming's Disaster and Civil Defense Act). By implication Wyoming's Disaster and Civil Defense Act grants broad police powers to counties to enact measures

protecting the public in times of disasters. It provides in relevant part that "any political subdivision . . . complying with or reasonably attempting to comply with [the Civil Defense Act], or any order . . . promulgated . . . pursuant to . . . *precautionary measures enacted by any political subdivision of the state* is not liable for the death of or injury to persons or for damages to property as a result of the activity . . . ." Wyo. Stat. § 19-5-113(a). A county is a political subdivision.[7] This provision provides governmental immunity to counties for damages arising out of their activities relating to the performance of civil defense functions.[8] Without limitation those functions include the following:

> The coordination of firefighting services, police services, medical and health services, rescue, engineering, attack warning services, communications, radiological defense, *evacuation of persons from stricken areas*, emergency welfare services, (civilian war aid), emergency transportation, existing or properly signed functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection, together with all other activities necessary or incidental to the preparation for any carrying out of the foregoing functions . . . .

Wyo. Stat. § 19-5-102(a)(i) (emphasis added). A disaster, includes those caused by natural causes. *Id.* The act also grants broad police powers to the governor overseeing the provisions of this act any time the disaster goes beyond local control. Wyo. Stat. § 19-5-104. Thus, the Act anticipates that counties at times will initiate civil defense functions independently of the governor. The court concludes that counties have emergency police

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[7] Wyo. Stat. § 19-5-102(a)(iv).

[8] "All activities relating to disaster and civil defense are governmental functions." Wyo. Stat. § 19-5-113(a).

powers under the Wyoming Civil Defense Act, which clearly include the power to order an evacuation of an area within the county stricken by a disaster of natural causes such as the seepage of lethal gasses.

TAKING CLAIM

The plaintiff also appears to assert a taking claim under the just compensation clause of the Fifth Amendment to the United States Constitution, which is made applicable to the states by the fourteenth amendment. To the extent the plaintiff asserts such a claim, the court finds that it is without subject matter jurisdiction to adjudicate it because the claim clearly is not ripe. *See Sinaloa Lake Owners Association*, 865 F.2d at 1480 (ripeness is a jurisdictional requirement). A taking claim under the fifth amendment is not ripe until the plaintiff has received a final determination from the agency responsible for an alleged regulatory taking and has sought compensation through state procedures. *Williamson County Regional Planning Commission*, 473 U.S. at 194-95. Although the first requirement may be inapplicable here, in that there is no longer an order prohibiting the plaintiff from returning to his home, he nonetheless has not satisfied the second prong requiring that he exhaust state remedies. In this case, the defendant prevented the plaintiff from returning to his home for a few days. It is doubtful that a temporary taking of this duration is compensable. *But cf. First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378, 2389 (1987) (temporary taking for period of years is compensable).

LIBERTY INTEREST

The plaintiff was arrested by sheriff deputies when he traveled through a roadblock in attempting to return to his home. The plaintiff asserts that he was deprived of his liberty interest in violation of the fourth amendment. Section 1983 provides a remedy against state actors who

deprive a person of a constitutionally protected liberty interest without due process of law. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). An individual's right to be free from an unlawful arrest and imprisonment implicates a constitutionally protected liberty interest the deprivation of which may be vindicated by Section 1983. *Motes v. Myers*, 810 F.2d 1055, 1059 (11th Cir. 1987). Under the fourth amendment, made applicable to the state by its incorporation into the fourteenth amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), a person has the right to be free from an arrest absent probable cause. *Baker*, 443 U.S. at 142; *Motes*, 810 F.2d at 1059. *See also Malley v. Briggs*, 475 U.S. 335 (1986) (unconstitutionally effected arrest vindicated by § 1983).

In this case the plaintiff was arrested by sheriff deputies after traveling through a barricade placed at the entrance of the stricken subdivision. The plaintiff, however, is not suing the deputies, but the county commissioners, and the county. It is therefore attempting to impose liability on these defendants for the acts of others. Although "Congress did intend that municipalities and other local government units to be included among those persons to whom Section 1983 applies," *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) (emphasis in original), such liability can be imposed only after a showing that "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. In *Monell*, the court rejected respondeat superior as a basis for a municipal liability under Section 1983, concluding that "a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." *Id.* (Emphasis in original). Otherwise stated, "[t]he 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the *municipality*, and thereby make it clear that munipal liability is limited to action for which the *municipality* is actually responsible." *Pembaur v. City of Cincinnati*,

106 S.Ct. 1292, 1298 (1986) (emphasis in original) (this quote comes from Part 2(A) of the opinion, joined by five justices). A municipality is liable for acts that it has sufficiently sanctioned or ordered. *Id.* Thus, local governmental entities are subject to suit under Section 1983 where the action alleged to be unconstitutional implements or executes policy, ordinance, regulation, or a *decision* officially adopted and promulgated by the bodies of its officers. A single incident of unconstitutional activity is not sufficient to impose liability under *Monell* absent proof that the incident was caused by an existing, unconstitutional policy attributable to a municipal policy maker. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion). Here the county can be held liable if the plaintiff can show that his arrest grew out of an unconstitutional policy adopted by the county. *Monell*, 436 U.S. at 661 n.2 (city policy forcing women employees to take maternity leave before medically necessary). Thus it would appear that the plaintiff is attempting to impose liability on the county on the ground that it formally adopted an unconstitutional policy requiring that he evacuate his home.

It would also appear, that the individual county commissioners could be held liable for the acts of sheriff deputies provided there was some showing of an "affirmative link between the occurrence of various incidences of public misconduct and the adoption of any plan or policy by the [defendants]—express or otherwise[] showing their authorization or approval of misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Thus these defendants potentially can be held liable under § 1983 for the acts of a sheriff deputy where they were "in a position of responsibility, knew or should have known of misconduct, and yet failed to act to prevent future harm." *McClellan v. Facteau*, 610 F.2d 693, 698 (10th Cir. 1979). The plaintiff appears to be alleging the defendants are liable because they were "in a position of responsibility, knew

or should have known of misconduct, and yet failed to act to prevent" the harm to him. *McClellan*, 610 F.2d at 697.

Assuming the plaintiff has established either one of these theories, the court must nonetheless determine whether the plaintiff's arrest was in violation of his fourth amendment rights. Under Wyoming law a person commits a misdemeanor if he travels through a roadblock that is supervised by a uniformed peace officer. Wyo. Stat. § 6-15-205 (1982). In his deposition, the plaintiff stated that he traveled through a road block that was supervised by two uniformed sheriff deputies. Although it is disputed how far he traveled past the road block it is certain he did so in the presence of uniformed officers. The officers undeniably had probable cause to arrest the plaintiff upon observing his committing a misdemeanor. His arrest therefore was constitutional.

SUBSTANTIVE DUE PROCESS

The plaintiff also asserts that "in ordering evacuation, the defendants violated his substantive due process rights." The fourteenth amendment embodies a substantive due process component, which encompasses a broad concept of liberty such as "the right to enjoy 'generally those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.'" *Ingraham v. Wright*, 430 U.S. 651, 671 (1977) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Substantive due process guarantees a right to be free from intrusion on personal security " 'through means so brutal, so demeaning and harmful as literally to shock the conscience.' " *Garcia v. Miera*, 817 F.2d 650, 655 (10th Cir. 1987), *cert. denied*, *Miera v. Garcia*, 108 S.Ct. 1220 (1988) (quoting *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)). Substantive due process also protects us "against arbitrary governmental action, even when the decision to take that action is made through procedures

that are in themselves constitutionally adequate." *Sinaloa Lake Owners Association*, 864 F.2d at 1483). It has long been established that arbitrary and capricious state action affecting property rights may violate substantive due process. *Village of Euclid*, 272 U.S. at 395.

To prevail on a substantive due process claim, the plaintiff must show that the action in ordering an evacuation of his property was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. In *Sinaloa Lake Owners Association*, the Ninth Circuit recognized the potential for due process violations when a state exercises emergency police powers. The court stated as follows:

> The exercise of emergency powers is particularly subject to abuse. Emergency decision-making is, by its nature, abbreviated; it normally does not admit participation by, or input from, those affected; judicial review, . . . is often greatly curtailed or non-existent. Exigent circumstances often prompt actions that severely undermine the rights of citizens, actions that might be eschewed after more careful reflection or with the benefit of safeguards it normally constrained governmental action.

864 F.2d at 1468. In determining whether such a violation has occurred, the court adopted the following test:

> [i]n determining whether the constitutional line has been crossed, a court must look to such factors as the need for the [governmental action] the relationship between the need and the [action taken], the extent of [damage] inflicted, and whether [the action was taken] in a good faith effort . . . or maliciously . . . for the very purpose of causing harm.

Id. (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

Here, the plaintiff concedes that lethal gasses were seeping from the ground into and around the homes of the subdivision. The evacuation was ordered after the DEQ's drilling in the subdivision increased the risk of exposure to hydrogen sulfide gas, the breathing of which could cause death or serious injury. Under these circumstances the temporary order appeared rational and substantially related to the public health and safety. As noted, the evacuation order was in effect for the duration of the DEQ's drilling. The plaintiff was allowed to return to his home within a few days so that the damage appears minimal, particularly since the county paid the plaintiff's lodging expenses incurred as a result of the county's evacuation order. There is no evidence that the action was taken in bad faith or maliciously for the purpose of causing harm, but rather all the evidence is to the contrary.

ABSOLUTE IMMUNITY

Even assuming the plaintiff asserts tenable claims under § 1983, the individual defendants contend they are entitled to absolute legislative immunity. In *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Court expanded absolute immunity to include regional legislators, holding that individual members of a regional planning commission were absolutely immune from damages under § 1983 to the extent they caused a deprivation of civil rights while acting in a legislative capacity. A majority of the circuits has since held that this immunity extends to members of local legislative bodies as well. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 577 (9th Cir. 1984); *cert. denied*, City of Burbank v. Cinevision Corp., 471 U.S. 1054 (1985); *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984); *cert. denied, Pekarski v. Abraham*, 467 U.S. 1242; *Reed v. City of Shorewood*, 704 F.2d 943 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982); *cert. denied, Meyerson v. Espanola Way Corp.*, 460 U.S. 1039 (1983); *Hernandez v. City of La-*

fayett, 643 F.2d 1188 (5th Cir. 1981); *cert. denied*, *Lafayette v. Hernandez*, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). *See also Ditch v. Board of County Commissioners of County of Shawnee*, 650 F.Supp. 1245 (D. Kan. 1986) (finding that the Tenth Circuit would extend absolute immunity to local legislative bodies).

The plaintiff does not dispute that this is the majority rule, but he argues that absolute immunity is unavailable here because in issuing evaculation resolutions, the defendants were acting in a non-legislative capacity. The court finds that it need not decide the issues underlying absolute immunity because it is clear that these defendants are entitled to good faith qualified immunity.

QUALIFIED IMMUNITY

As officials performing discretionary functions, the defendants are entitled to assert qualified immunity from this lawsuit. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Defendants are entitled to immunity from liability for civil damages under Section 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* The court's holding in *Harlow*, focused on the defendant's objective good faith, which "involves a presumptive knowledge in respect for 'basic, unquestioned constitutional rights.'" *Id.* at 18 (quoting *Wood v. Stricklan*, 420 U.S. 308, 322 (1975)).

The plaintiff has the burden of establishing that the constitutional rights allegedly violated were clearly established. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, (10th Cir. 1988). The plaintiff merely asserts that under *Harlow*, the defendants are not entitled to qualified immunity because the law is clearly established that a person cannot be deprived of property without due process of law or arrested absent probable cause.

In *Anderson v. Creighton*, 107 S.Ct. 3034, 2039 (1987), the court recognized that applying *Harlow* "at this level of generality bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." If this were the test the "plaintiff would be able to convert the rule of qualified immunity that our cases plainly established into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* Thus, the plaintiff must do more than identify in the abstract a clearly established right of which he was allegedly deprived. Rather, he must show that the contours of the right "were sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* In other words, the question is whether a reasonable official could have believed his conduct lawful in light of clearly established law and the information the officer possessed." *Id.* at 3040.[9]

The plaintiff has not shown there was clearly established law prohibiting the defendants' actions and as the court has found the law is to the contrary. The defendants were confronted with an emergency of potentially life-threatening proportions. Under the Wyoming Disaster and Civil Defense Act reasonable county officials could have believed they had police powers to protect the public safety by ordering an evacuation of an area stricken by deadly gasses. The act does not require a predeprivation hearing and the law in general does not require one when the state acts to avert an imminent

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[9] In *Anderson*, the plaintiff brought a civil rights action against police officers and FBI agents for allegedly violating his fourth amendment rights, after the defendants entered and searched his home with neither a warrant nor exigent circumstances. On the qualified immunity issue the court stated, "It simply does not follow immediately from the conclusion that it was firmly established that a warrantless search not supported by probable cause and exigent circumstances violate the fourth amendment that [defendant's] search was objectively legally unreasonable." 107 S.Ct. at 3039.

catastrophe. Based upon the status of the law and the information possessed by these defendants, the court must conclude that a reasonable official in their position would not understand that what he was doing violated a right. Assuming they did violate constitutional rights, which this court already has found they did not, the defendants would nonetheless be entitled to qualified immunity.

In accordance with this opinion, IT IS HEREBY ORDERED that summary judgment be GRANTED in favor of all of the defendants on all of the plaintiff's claims against them.

Dated this 2d day of October, 1989.

By the Court:

/s/ Alan B. Johnson
United States District Judge

Entered on the Docket Oct. 2, 1989

WILLIAM C. BEAMAN
Clerk

by /s/ Betty Green
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. C89-0134J

H. DOUGLAS MILLER, *et al.*,
Plaintiffs,

v.

CAMPBELL COUNTY, WYOMING; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CAMPBELL, BILL BARKLEY, THOMAS OSTLUND, and MICKEY WAGENSEN, CAMPBELL COUNTY SHERIFF'S DEPARTMENT, CAMPBELL COUNTY HEALTH DEPARTMENT, CAMPBELL COUNTY ENGINEER'S OFFICE, CAMBELL COUNTY FIRE BOARD, and CAMPBELL COUNTY EMERGENCY SERVICES AGENCY,
Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

[Entered Nov. 20, 1989]

THE ABOVE CAPTIONED MATTER came before this court on November 7, 1989, for hearing on the defendants' October 20, 1989, motion for summary judgment. At the hearing held in this matter, the plaintiffs were represented by Gary L. Shockey, and the defendants were represented by Rick Thompson. For reasons stated below, the court will grant the defendants' motion.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The purpose of summary judgment

is to unmask frivolous claims and to put a "swift end to meritless litigation." *Quinn v. Syracuse Model Neighborhood Corporation*, 613 F.2d 438, 445 (2d Cir. 1980). In deciding a motion for summary judgment the court must consider only material facts, which are generally identified by the substantive law governing a given cause of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus factual disputes that are irrelevant or unnecessary cannot defeat an otherwise properly supported motion for summary judgment because "only disputes over facts that might affect the outcome of a suit under governing law will preclude summary judgment." *Id.* at 247-48.

The party moving for summary judgment has the initial burden of informing the court of the basis for its motion, "which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The moving party need not disprove the plaintiff's claims, but must only show that the facts are without legal significance. *Windon Third Oil and Gas Drilling Partnership v. Federal Deposit Insurance Corporation*, 805 F.2d 342, 346 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987). Once the moving party has met this initial burden, the burden shifts to the nonmoving party to make a sufficient showing establishing the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Catrett*, 277 U.S. at 323. In ruling on the defendants' motion the court of course must accept the plaintiffs' allegations as true and state them in a light most favorable to them as they are found in the complaint, the affidavits, and the depositions and interrogatories. *Garcia v. Miera*, 817 F.2d 650, 652 n.1 (10th Cir. 1987), *cert. denied, Miera v. Garcia*, 108 S.Ct. 1220 (1988).

The plaintiffs seek damages under 42 U.S.C. § 1983, alleging that the defendants deprived them of their civil

rights under the Fourteenth Amendment to the United States Constitution. They also appear to assert common law claims for damages based on negligence theories. The plaintiffs were former residents of a subdivision known as the Rawhide subdivision, which is located in Campbell County, Wyoming, and adjacent to a large open pit coal mine owned and operated by Amax Coal Company. In February 1987 it was discovered that methane and hydrogen sulfide gasses were seeping from the ground in the Rawhide subdivision. In response to this discovery, the Campbell County Commissioners, on February 24, 1987, recommended that at least 13 homes located on Salt Box Lane within the subdivision be vacated. The next day, on February 25, 1987, the county, through its commissioner Bill Barkley, and its emergency manager, D. David Holland, declared an emergency and ordered the evacuation of seven homes along Salt Box Lane. On February 26, 1987, the defendants added two more homes to that order. On March 6, 1987, the defendant Holland issued another evacuation order requiring the evacuation of an additional 22 homes. On March 26, 1987, the county passed an additional resolution, which continued the evacuation order for seven of the original homes evacuated, but permitted occupants of 18 of the residences to return to their homes, provided they agreed to install gas detectors and gas vents. That resolution also allowed return of occupants for six other homes for which the county would provide gas detectors. No assistance would be provided to those choosing not to return.

On May 29, 1987, the county commissioners evidently issued a resolution declaring that the Rawhide Village subdivision and the Horizon subdivision were uninhabitable. The resolution was issued after an emergency meeting, which was attended by the Campbell County Health Officer and the Campbell County Sheriff. The resolution was recommended by the Campbell County Health Department, the Campbell County Fire Board and the Campbell

County Engineer. A few days later, on June 2, 1987, the commissioners passed a resolution requiring that all residents of the areas affected by the gasses be relocated and that no further occupation of these areas would be allowed after 5:00 p.m., July 31, 1987. The plaintiffs contend that this June 2, 1987, resolution "was to order a full, complete, and permanent evacuation of Rawhide Village, with no further access to the property of plaintiffs." Complaint at ¶ 9.

In a subsequent resolution of the Campbell County Commissioners, dated July 3, 1987, the county ordered that all residents remaining in the subdivision be evacuated immediately. Evidently this resolution requiring immediate evacuation was issued to accommodate the Wyoming Department of Environmental Quality's drilling program, the purpose of which was to obtain information and data to support an appeal of a denial of disaster relief funds from the federal government. Evidently, the county had made an application to the Federal Emergency Management Agency for disaster relief for the residents of Rawhide Village. The application, however, was denied by that agency notwithstanding the county's assertion that its evacuation orders were based on extensive medical information concerning the toxicity and explosive potentials of methane and hydrogen sulfide gasses.

On July 28, 1987, the commissioners did an about face and rescinded their prior orders of mandatory evacuation of homes in the Rawhide subdivision. A resolution issued as a result of that decision stated that the subdivision remained uninhabitable and that the residents should be evacuated.

On May 26, 1989, the plaintiffs filed this action alleging that the county and its commissioners had deprived them of their constitutional rights, which included the deprivation of property and liberty interests without due process of law as well as deprivation of their substantive due

process rights under the Fourteenth Amendment to the United States Constitution. The defendants have filed a third party complaint against the United States of America, the Federal Emergency Management Agency, Julius W. Becton, Jr., David P. Grier, IV, and Amax Coal Company. They seek indemnity from these third party defendants based on negligence theories.

This is the third lawsuit filed in this court relating to the gas problems of the Rawhide subdivision. In the first lawsuit, many of these plaintiffs sued Amax Coal Company under various tort theories alleging Amax's mining operations caused the dangerous gasses to seep into the subdivision and into their homes thereby causing them injuries to their property and persons. The court dismissed that action on April 26, 1989, because of a settlement reached by and between the parties.

On July 7, 1988, one of the plaintiffs in this case, H. Douglas Miller, filed a civil rights action against Campbell County and its commissioners, Bill Barkley, Thomas Ostlund, and Mickey Wagensen, alleging that these defendants by passing the resolutions at issue deprived him of constitutional rights, which included deprivation of his property rights without due process of law, deprivation of his substantive due process rights as well as deprivation of his liberty interest. The latter allegation was based on his having been arrested by sheriff deputies after he traveled through a roadblock to the subdivision. On October 2, 1989, the court granted the defendants' motion for summary judgment in that action, finding that the defendants did not deprive the plaintiff of any constitutional rights. Because this third complaint raises substantially similar claims, the court hereby incorporates by reference its findings and conclusions contained in its memorandum opinion and order granting summary judgment in *Miller v. Campbell County*, No. 88-0194J, slip op. (D. Wyo. Oct. 2, 1989).

In that memorandum opinion, the court found that the defendants' actions constituted an exception to the rule that the state provide predeprivation procedural due process before depriving somebody of property. The court held that the taking of property without prior notice and an opportunity to be heard did not violate due process where the deprivation was the result of summary governmental action taken in emergencies and designed to protect the public health, safety, and general welfare. *Id.* at 11. In so holding the court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950); *Yakus v. United States*, 321 U.S. 414 (1944); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908); *Sinaloa Lake Owners Association v. City of Simi Valley*, 864 F.2d 1475 (9th Cir. 1989); *Poage v. City of Rapid City*, 431 F. Supp. 240 (D. S.D. 1977); *Owen v. City of Rapid City*, 315 N.W.2d 496 (S.D. 1982); *City of Rapid City v. Boland*, 271 N.W.2d 60 (S.D. 1978).

Similarly the court found that the plaintiff in his prior civil rights action additionally asserted a taking claim for which this court lacked subject matter jurisdiction because the claim was not ripe. *Id.* at 16. A taking claim under the fifth amendment is not ripe until a plaintiff has received a final determination from the agency responsible for an alleged taking and has sought compensation through state procedures. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985). It is undisputed that the plaintiffs in this case have failed to exhaust their state remedies thereby rendering unripe any taking claim they may be asserting.

The court also found in its prior memorandum opinion that the defendants did not deprive the plaintiff of substantive due process because it found that the county's actions in the face of the gas problems in the subdivision

were a measured response for which a temporary evacuation order appeared rational and substantially related to the public health and safety. In this case, as in Miller's prior civil rights suit, the plaintiffs presented no evidence that the action was taken in bad faith or maliciously for the purpose of causing harm. *See Catrett*, 477 U.S. at 322 (to defeat a motion for summary judgment, the nonmoving party must present evidence that puts in issue the existence of an element essential to the nonmoving party's case). A nonmoving party's failure to present such evidence will entitle the moving party to judgment as a matter of law. *Id. See also Windon*, 805 F.2d at 346 (in deciding a motion for summary judgment, the court must ask whether a fair minded jury could return a verdict for the non-moving party based on the evidence presented). The county's actions with respect to the DEQ's drilling program appear to have been motivated by a need to obtain emergency disaster relief funds that would have been used not to benefit the defendants personally but rather to help alleviate the problems confronted by the residents of the Rawhide subdivision. Finally the court found that the individual defendants were entitled to good faith qualified immunuity because given the status of the law and information possessed by the individual defendants at the time, a reasonable official in their position would not understand that what he was doing violated a right. In reaching that holding the court relied principally on *Anderson v. Creighton*, 107 S.Ct. 3034 (1987); and *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988).

In their opposition to the defendants' motion for summary judgment the plaintiffs argue that summary judgment is inappropriate here for two reasons. First, a factual issue exists concerning whether the defendants could rely on the Wyoming Disaster and Civil Defense Act as authority for their actions. Wyo. Stat. §§ 19-5-101 to 19-5-116 (1977). According to the plaintiffs this Act grants authority to counties to enact measures protecting

the public during a disaster that is a result of natural causes as opposed to "man induced disasters." Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 12. Under the plaintiff's theory if the hydrogen sufide and methane gas seepages were the result of Amax's mining operations, presumably the defendants do not have the governmental immunity generally afforded to them by Wyoming's Disaster and Civil Defense Act. The Act grants governmental immunuity to all persons that cause death or inquiry to persons or damage to property as a result of activity they undertake in complying with or reasonably attempting to comply with precautionary measures enacted pursuant to the Civil Defense Act. Wyo. Stat. § 19-5-113(a). By its plain terms, the statute grants governmental immunity from common law tort claims. The plaintiffs' purported factual issue, however, is immaterial to this case, which has been brought under § 1983. Merely because the defendants, under the plaintiffs' theory, may lose their governmental immunity from common law tort claims, it does not follow that they would lose their good faith qualified immunity in a § 1983 action as articulated by the United States Supreme Court in *Anderson v. Creighton*, 107 S.Ct. 3034 (1987); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Second, the plaintiffs argue there are genuine issues of material fact concerning whether an emergency existed in the Rawhide subdivision. Again, the court finds that those issues are immaterial. If it is shown an emergency in fact did not exist, the plaintiff would be entitled to damages in a post-deprivation proceeding in state court. *North American Cold Storage*, 211 U.S. at 306 (1908). These are genuine issues of material fact relevant to the plaintiffs' action for damages against the defendants in state court. They do not, however, have any materiality in the context of a § 1983 action. Accordingly, the court shall grant the defendants' motion for summary judgment on the plaintiffs' civil rights claims.

The plaintiffs also assert what would appear to be claims for damages based on negligence theories for which no independent bases of jurisdiction are alleged. To the extent those claims are state law claims, the court will dismiss them for want of subject matter jurisdiction. Now therefore

IT IS HEREBY ORDERED that summary judgment be granted in favor of all the defendants on all the plaintiffs' civil rights claims against them. To the extent the plaintiffs assert state law claims,

IT IS FURTHER ORDERED that those claims be dismissed for lack of subject matter jurisdiction.

IT IS FINALLY ORDERED that the defendants' third party complaint for indemnity be dismissed without prejudice.

Dated this 16th day of November, 1989.

By the Court:

/s/ Alan B. Johnson
United States District Judge

Entered on the Docket Nov. 20, 1989

WILLIAM C. BEAMAN
Clerk

by /s/ Betty Green
Deputy Clerk

[SEAL]

CAMBELL COUNTY EMERGENCY
SERVICES AGENCY

Statement to Residents of Rawhide Village

February 25, 1987

For the past two weeks or more, officials from Campbell County have been consulting with experts from DEQ, BLM, EPA, Wyoming Health Department, and other agencies concerning the problem of methane gas in Rawhide Village. Based upon that consultation, several test holes have been drilled. One of those test holes contains Hydrogen-sulfide gas at dangerous concentration levels. Hydrogen-sulfide gas is poisonous.

Tests have been taken in the houses adjacent to that test hole and no hydrogen-sulfide has been found. The test hole is currently being vented under controlled conditions.

Additional testing has disclosed a pressure level which is higher than expected upon the hydrogen-sulfide pocket. This factor could possibly induce slow movement of the Hydrogen-sulfide through underground seepage. It is also a possibility that this seepage will follow the same paths of low resistance which exists for the release of methane gas.

To ensure the safety of human life, the County is acting under its emergency powers and is declaring an emergency and ordering the temporary evacuation of homes at addresses as follows: 186, 187, 188, 189, 190, 191, 192, Saltbox Lane, Rawhide Village, Campbell County, Wyoming. These addresses have registered consistent measurements of methane gas during the monitoring program undertaken by the County Engineer and are the homes where hydrogen-sulfide could possibly appear.

The evacuation is not a permanent decision. It is a precautionary, temporary decision and may be changed at

anytime. Alternate housing will be financed for the families required to evacuate. The statement to residents issued on February 23, 1987 is still valid advice for other properties identified in that recommendation. It is the desire and hope of Campbell County Officials that all residents of Rawhide Village will be able to return to their homes within thirty days.

Emergency Management Council,

/s/ Bill Barkley
BILL BARKLEY, Chairman

/s/ B. David Holland
Emergency Manager

David Holland, Emergency Manager
600 West Boxelder
Gillette, WY 82716
(307) 682-7271

[SEAL]

CAMBELL COUNTY EMERGENCY
SERVICES AGENCY

March 6, 1987

For the past week In-Situ Inc. has been conducting a test measurement and sampling program at Rawhide Village, Campbell County, Wyoming. The data reveals a very high level of soil saturated with methane gas around a number of homes in the area. The readings have indicated soil/gas measurements has high as 100% methane (absolute saturation) in a yard or two, with levels ranging down to approximately 30% or 40% in the yards of homes identified below. A danger exists because the saturation of methane gas, under existing pressure, could find its way inside the residence in those areas.

Based upon the In-Situ Inc. evaluation of data and their consultation with Campbell County commissioners, the Commission has met in an emergency session and has expanded the emergency evacuation order determined on February 26, 1987 to include homes at addresses as follows:

Chief Court—12
Salt Box Lane—194, 195, 196, 197, 198, 199, 200, 201, 202, 204, 205, 206, 207, 209
Sitting Bull—195, 196, 197, 198, 199
War Chant—504, 506

The level of methane gas saturation around these homes creates a definite potential for contamination.

This temporary evacuation order is to be carried out with the same provisions and requirements established for alternative/transition housing as specified with the order on February 26, 1987. A single $400.00 allowance is authorized for those families forced to evacuate. The payment is provided as a substitute for emergency shelter care.

The evacuation is not a permanent decision. It is a precautionary, temporary decision and may be changed or expanded at any time. The statement to residents issued on February 23, 1987 that carried with it warnings and advice to all residents is still a valid recommendation for other properties in the subdivision. It is the desire and hope of Campbell County Officials that all residents of Rawhide Village will be able to return to their homes within thirty (30) days.

Emergency Management Council,

/s/ B. David Holland
DAVE HOLLAND, Emergency Manager

David Holland, Emergency Manager
600 West Boxelder
Gillette, WY 82716
(307) 682-7271

SPECIAL MEETING
CAMPBELL COUNTY COMMISSIONERS

THURSDAY—March 26, 1987

PRESENT:

Bill L. Barkley, Chairman
Mickey D. Wagensen, Commissioner
Thomas A. Ostlund, Commissioner
John D. Young, County Attorney
Byron F. Oedekoven, County Sheriff
B. David Holland, Emergency Manager
Charles Hartman, Assistant Commissioner
Wyoming Department of Insurance
Chester McKee, President, In-Situ
Phil Gerhart, VP, In-Situ
Suzanne Wuerthele, Toxicologist, EPA
Jim Honn, Dept. of Environmental Quality
Mike Koppman, Dept. of Environmental Quality

I. OPENING STATEMENTS—A meeting was held at 7:00 p.m. with the above officials and Rawhide Village Homeowners. Bill L. Barkley, Chairman, Campbell County Commissioners, opened the meeting by laying the ground rules for questions by the homeowners.

II. BACKGROUND—Next item of business was a short background of the problems and remedies that have occurred thus far at Rawhide Village.

III. HEALTH ISSUES—Suzanne Wuerthele, Toxicologist, Environmental Protection Agency, then discussed the methane and hydrogen sulfide gases present in the subdivision. She advised that she had left printed information at the Campbell County Public Health Office which is available to the public. Dosage/exposure is a principal effect of the gases. Ms. Wuerthele discussed the symptoms of methane and hydrogen sulfide gas poisoning. Symptoms for methane gas are headaches, dizziness,

ataxia, unconsciousness; for hydrogen sulfide gas the symptoms are drunk acting, it is a powerful irritant and affects the throat, eyes and nose, also affects cellular respiration. Ms. Wuerthele then conducted a question and answer period.

IV. INSURANCE—Mr. Charles Hartman, Assistant Commissioner for the Wyoming Department of Insurance, answered various questions from homeowners at this time. Hartment advised that he is one of three persons in the consumer complaint division, gave his address and telephone number and stated that his department would give any help they could with insurance policy problems.

V. RESEARCH REPORTS—Chester McKee, President of In-Situ, Inc. discussed the investigation they had conducted which included toxic gas measurements, test holes, soil gas mapping, geology, mine dewatering, water quality, air quality and blasting. McKee also gave their recommendations and conclusions from the draft report.

Phil Gerhart then explained how the various gas readings were taken and how they were read. Gerhart discussed the slide presentation.

VI. OPTIONS—Tom Ostlund, County Commissioner, discussed options and solutions for Rawhide Village residents.

a. First option—do nothing.

b. Continue to evaluate the problem.

Advantages: drill more test holes deeper and find out what is down there.

Disadvantages: cost, time, don't know if it will work.

c. Technical remedy.

Advantages: dissipate the gases—flare.

d. Partial relocation of residents.

Advantages: Some people can stay. Like where they live.
Disadvantages: no resale value, doesn't solve the problem, higher water/sewer bills.

d. Relocate the entire subdivision.

Commissioner Ostlund also discussed the Personal Information questionnaire that was given to Rawhide residents to complete. The questionnaire was to give information on what the people want as far as mortgage buyout, mortgage forgiven by exchange, appraisal buyout or relocate your home with mortgage.

VII. POLICY—Commissioner Barkley then discussed the policies that would be implemented for the various houses in Rawhide Village. Commissioner Barkley explained the monitoring program, the conditions for temporary relocation and continued funding.

The following letter was given to the residents at:

186 Salt Box Lane
187 Salt Box Lane
188 Salt Box Lane
189 Salt Box Lane
190 Salt Box Lane
191 Salt Box Lane
192 Salt Box Lane

On February 26, 1987, you were asked to leave your home by the Campbell County Commissioners. This request was based on the recommendation of the In-Situ, Inc., consultant hired by the county to investigate the gas problems occurring in the Rawhide Village Subdivision. Due to the proximity of your home to the hydrogen sulfide well located at

190 Salt Box Lane, it was determined that for your safety it would be necessary to relocate you.

Continuous monitoring by the county of the problem in the Rawhide Subdivision indicates that there has been no noticeable change in the gas levels of homes presently occupied. However, the county still believes that there is a risk to your health and safety should you be allowed to return to your home. As such, you are still prohibited from returning to your residence.

For the month of April, the county will provide you the following assistance:

1. A rental payment in the amount of $400.00; or
2. Relocate you in an alternate housing unit.

You will be informed by the county when alternate housing is located. Until that time, you should expect to receive the $400.00 rent payment. If you need a rent check for the month of April, please stop by the County Commissioner's Office on Monday, March 30, 1987, to make arrangements for collecting the funds.

Up until this time, the Campbell County Sheriff's Department has provided the affected area with 24 hours security. Effective April 1, 1987, the Sheriff's Department will no longer have a deputy stationed around the clock. Your house will be placed on the Sheriff's Department house watch. Special attention and patrol will be given to Salt Box Lane. Further, the Sheriff's Office will assist you in setting up a Neighborhood Watch program. However, it is important to remember that you should take appropriate action to secure your home as it will no longer be watched 24 hours a day.

Should you have any questions regarding this matter, please do not hesitate to contact Emergency Manager David Holland at 682-2602.

Thank you in advance for your cooperation.

The following letter was hand delivered to residents at the addresses listed below:

12 Chief Court	193 Salt Box Lane
203 Salt Box Lane	194 Salt Box Lane
195 Salt Box Lane	196 Salt Box Lane
197 Salt Box Lane	198 Salt Box Lane
199 Salt Box Lane	200 Salt Box Lane
201 Salt Box Lane	202 Salt Box Lane
204 Salt Box Lane	205 Salt Box Lane
195 Sitting Bull	197 Sitting Bull
199 Sitting Bull	506 War Chant

On March 6, 1987, you were asked to leave your home by the Campbell County Commissioners. This request was based on the recommendation of the In-Situ, Inc., consultant hired by the county to investigate the gas problems occurring in the Rawhide Village Subdivision. Due to the high or constant methane gas reading in your house or in the soil immediately around your home, it was determined that for your safety it would be necessary to relocate you.

Continuous monitoring by the county of the problem in Rawhide Subdivision indicates that there has been no noticeable change in the gas levels of homes presently occupied. As such, the county has determined that you will be permitted to return to your home should you choose to do so. However, three criteria must be met by you before you will be allowed to return. Those criteria are:

1. To revent the accumulation of gas in your home, you must install vents which meet the County Engineer's specifications.

2. Install gas detectors in your home. The county will assist you in obtaining the necessary monitors.

3. A letter of understanding must be signed by you that acknowledges you have been advised of the methane readings in your house and yard; that you are aware of the dangers associated with these readings and based on this information you the homeowner choose to return to your home.

RESOLUTION

BE IT RESOLVED by the Board of County Commissioners, Campbell County, Wyoming, this 29th day of May, 1987, that after extensive discussions with the Campbell County Public Health officer, reports and indicated diagnosis given by the medical community, increasing readings under the gas monitoring program, advise from the Campbell County Fire Department and pursuant to the authorities provided by Wyoming Statute Section 18-3-501 et. seq. (1977 as amended), Wyoming Statute Section 19-5-101 et seq. (1977 as amended), Wyoming Statute Section 35-1-301 et seq. (1977 as amended), and Wyoming Statute Section 35-4-101 through 35-4-105 (1977 as amended), it is the conclusion of this Board that the areas encompassing the Rawhide Village subdivision and the Horizon subdivision should be and the same are hereby declared uninhabitable for human habitation. Evacuation is ordered and needs to be accomplished as soon as possible. The following steps are being implemented to facilitate the action taken:

1. A time frame for forced evacuation will be considered in the regular commission meeting to be held June 2, 1987. An "assumption of risk" acknowledgement will then be required from residents still in the affected homes.

2. The County Commissioners have arranged for temporary lodging for displaced families at motels listed below. The motels will need a copy of this resolution with the Rawhide or Horizon address written on it along with proof of identity when the family registers. The provision is for one double room, or single room if appropriate, and the motel lodging will extend for not more than thirty (30) days. Participating motels are named as follows:

Ramada	Arrowhead
Sands	Super 8
Econo Lodge	Rolling Hills
Prime Rate	Circle 1

APPROVED AND ADOPTED this 29th day of May, 1987.

BOARD OF COUNTY COMMISSIONERS
Campbell County, Wyoming

/s/ Bill L. Barkley
BILL BARKLEY
Chairman

/s/ Thomas A. Ostlund
THOMAS A. OSTLUND
Member

/s/ Mickey D. Wagensen
MICKEY D. WAGENSEN
Member

[STATE SEAL]

Resident:

_____
Name

_____
Address

_____
Signature

/s/ George B. McMurtrey
Dr. GEORGE MCMURTREY
Campbell County Public
Health Officer

RESOLUTION

BE IT RESOLVED by the Board of County Commissioners, Campbell County, Wyoming, this 2nd day of June, 1987, that after lengthy and extensive discussions with the Campbell County Public Health Officer, the Campbell County Public Health Department, the Gillette-Campbell County Fire Department, the State Office of Management Agency concerning the health, environmental and fire hazards associated with methane and hydrogen sulfide gas, and pursuant to the authorities provided by but not limited to the following Wyoming Statutes: Wyoming Statute 18-3-501 et seq. (1977 as amended), Wyoming Statute 19-5-101 et seq. (1977 as amended) and Wyoming Statute 35-1-301 et seq. (1977 as amended), it is the conclusion of this Board that the areas encompassing the Rawhide Village subdivision and the Horizon subdivision should be and the same are hereby declared uninhabitable for human habitation; and

BE IT FURTHER RESOLVED that pursuant to said finding all residents of the affected areas shall be relocated and removed therefrom and no further occupation of the area shall be allowed from and after 5:00 p.m. July 31, 1987; and

BE IT FURTHER RESOLVED that Campbell County, Wyoming, shall assist in the provision of alternative shelter for displaced persons through the evening of June 30, 1987; and

BE IT FURTHER RESOLVED that this Resolution shall be and is hereby declared to be of full force and effect immediately.

PASSED, APPROVED AND ADOPTED this 2nd day of June, 1987.

BOARD OF COUNTY COMMISSIONERS
Campbell County, Wyoming

/s/ Bill L. Barkley
Chairman

Attest:

/s/ Vivian E. Addison
County Clerk

RESOLUTION
RAWHIDE VILLAGE DECLARATION

WHEREAS Campbell County has exercised emergency police powers under Wyoming Statutes 19-5-101 through 19-5-116 and Wyoming Statutes 35-4-101 through 35-4-105, addressing the dangerous conditions and health hazards existent with the venting of underground gases at Rawhide Village, Campbell County, Wyoming; and,

WHEREAS information and data has provided further assurance that all of Rawhide Village Subdivision remains nonhabitable, and,

WHEREAS information and data is still being complied for delivery to the Federal Emergency Management Agency; and

WHEREAS federal legislation has been introduced by U.S. Representative Dick Cheney which may provide some measure of relief for Rawhide property owners; and,

WHEREAS the County wants to ensure that local actions do not jeopardize affirmative federal decision making;

NOW THEREFORE the Campbell County Commissioners declare and resolve as follows:

1. The Commissioners' previous declaration that all of Rawhide Village Subdivision is nonhabitable is ratified and reaffirmed.

2. All of Rawhide Village Subdivision should be evacuated.

3. Because additional time is required to process the appeal to the Federal Emergency Management Agency on Rawhide being declared a disaster area by President Reagan and for Representative Cheney's bill to proceed through Congress, the mandatory evacuation of homes in Rawhide Village is suspended until further action is appropriate.

4. Because the Wyoming Disaster and Civil Defense Act, W.S. 19-5-101 through 19-5-116, does require the County to act during an emergency situation and to take the steps necessary to prevent an emergency situation from arising, the Campbell County Commissioners now hereby issue the strongest warnings possible against living and remaining in Rawhide Village and against reentry for purposes of habitation.

3. The Campbell County Sheriff's Department will provide security patrols in the Rawhide area at more frequent intervals than as provided for other parts of the County.

6. The Gillette-Campbell County Fire Protection Joint Powers Board needs to undertake planning to provide fire response and for the eventual alleviation of the hazards of fire and explosion at Rawhide.

7. The Campbell County Commissioners request that the Campbell County Board of Public Health and the County Public Health Officer assemble additional data upon the health and safety issues relating to the Rawside situation and seek the opinion of a recognized expert as to the implications of such data.

APPROVED AND ADOPTED this 28th day of July, 1987.

BOARD OF COUNTY COMMISSIONERS,
Campbell County, Wyoming

/s/ Bill L. Barkley
BILL BARKLEY, Chairman

Mickey D. Wagensen
MICKEY D. WAGENSEN, Member

Thomas A. Ostlund
THOMAS A. OSTLUND, Member

[STATE SEAL]